90-1385

No. _____

Supreme Court, U.S.
FILED
FEB 25 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

FERNANDO W. ANGLADA-ALVAREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Government met its burden of proof and persuasion to establish the reasonableness and legality of a warrantless search conducted by Commonwealth of Puerto Rico police agents that had been issued designations to act as customs officers in very specific and delineated circumstances.

2. Whether *Caceres* excuses the deviation from strict compliance with Customs Service's regulations for the deputization of Commonwealth law enforcement agents as customs officers.

3. Whether the good faith exception applies to warrantless searches.

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals was entered on November 27, 1990 and appears reprinted in Appendix A at page App. 1. The Opinions of the District Court appear reprinted in Appendixes B and C at pages App. 27 and App. 34, respectively.

JURISDICTION

The jurisdiction of the court is invoked under 28 USC 1254(1) and Rule 10.1(a) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the Constitution of the United States provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This is a criminal prosecution on a two count indictment brought against petitioner and three others. Count One charged the four defendants with aiding and abetting each other in the possession with intent to distribute of approximately sixty-three kilograms of cocaine within the customs waters of the United States in violation of Title 46 USC § 1903(a), (c) and (f). Count Two charged the importation of the same cocaine into the customs territory of the United States in violation of Title 21 USC § 952(a).

The facts that led to the indictment of petitioner occurred the night of November 16, 1988 when the defendants, sailing on board the M/V CATU, were intervened off the Southwest coast of Puerto Rico by Police of Puerto Rico agents allegedly deputized to act as customs officers. Defendants had left the Dominican Republic in the early morning hours of that same day and at the time of the police intervention were headed to Puerto Real, a port in the Southwestern coast of Puerto Rico.

The M/V CATU was intervened by a Commonwealth of Puerto Rico police boat, the ZP-7, that had left its home port earlier that night to conduct a general patrol of the Southwest and West coasts of Puerto Rico. The crew of the ZP-7 was composed by five members of the Commonwealth's maritime unit and by a Commonwealth narcotics agent. Three of the members of the maritime unit and the narcotics agents had been cross-designated as customs agents (excepted).

These designations as customs officers (excepted) were issued to the police agents pursuant to a memorandum of understanding between the U.S. Customs Service and the Police of Puerto Rico (Appendix D, App. 39) which in paragraph B. establishes that

> The Puerto Rico Police Department agrees:
>
> 1. . . .
>
> 2. that Customs officer designations to employees of the Puerto Rico Police Department will be used *only in situations when there has been specific advance approval by the Customs Watch Commander* and only to the extent approved by the Customs Watch Commander and for the

> duration of the specific law enforcement activity for which the approval was gained. (App. 40; emphasis added.)

Pursuant to that agreement between the Customs Service and the Police Department of Puerto Rico, the cross-designations as customs officials (excepted) of the individual Commonwealth policemen were issued through Customs Form 55. Those designation forms add another Customs officer as the person designated by the Secretary of the Treasury to authorize the police agents to act as customs officers (excepted) and that is the Customs Special Agent-in-Charge (SAC). Appendix E, App. 42.

When the M/V CATU was spotted by the Commonwealth police boat, it was flying its flag and had its sailing lights on. Notwithstanding, the police requested that the CATU stop, put on the ZP-7's lights and approached the vessel. The captain of the ZP-7 asked if there were objections to come alongside and check documents and, since no objection was made, the two boats tied up together. Documents were inspected and both the registration papers for the CATU and the passports for all on board were in order.

There was nothing suspicious about the CATU and the police officers had no probable cause nor reasonable suspicion to think that a crime was being committed and federal authority was needed to supply the deficiencies of this Commonwealth process. Authorization to board and search as customs agents was requested to the Customs headquarters in San Juan and, after several calls, a supervisor of the air smuggling unit of customs, Mr. William Jiménez, who was neither the Watch Commander nor the Special Agent-in-Charge, granted it. When asked who the

watch commander was that night and what were the duties of a watch commander, he candidly admitted he did not know. He nevertheless described himself as "the functional equivalent of the watch commander."

The Commonwealth police agents to whom cross-designations had been issued then boarded and searched the M/V CATU and found it to be transporting 63 kilograms of cocaine in a cargo hold. The crew of the M/V CATU was put under arrest and transported to the station of the Commonwealth maritime unit wherein they were surrendered to federal customs and drug enforcement agents. Shortly thereafter, petitioner made an incriminating statement to a drug enforcement agent.

Petitioner made diverse pretrial motions to suppress the cocaine and the statement made by him under custody to which the Government responded. One of the grounds raised by petitioner was the illegality of the search carried out by the allegedly deputized Puerto Rico Police officers. Petitioner further argued that since he had been the object of a warrantless search and seizure, the government had the burden of proof to establish the reasonableness and legality of the search.

A U.S. Magistrate conducted hearings on the motions and reported and recommended that they be denied. An appeal to the Court was taken who denied the suppression of evidence (Appendix B, App. 27).

The case went to trial and defendant moved the District Court for an acquittal pursuant to Rule 29, Fed. R.Cr.P., at the end of the government's case and at the close of all the evidence and the motion to suppress

because of the invalid deputization was again renewed and denied. (Appendix C, App. 34)

In denying the motion to suppress, the District Court never ruled as a matter of fact if the customs supervisor that had given the prior authorization to board the M/V CATU was, or could act in lieu of, the watch commander. Surprisingly, the Court of Appeals made that factual determination.

REASONS FOR GRANTING THE WRIT

1. **Whether the Government met its burden of proof and persuasion to establish the reasonableness and legality of a warrantless search conducted by Commonwealth of Puerto Rico police agents that had been issued designations to act as customs officers in very specific and delineated circumstances.**

In order for the Court of Appeals to rule as a matter fact that the self-proclaimed "functional equivalent of the watch commander" was indeed the watch commander – a conclusion never ventured by the District Court – it shifted the burden of proof and of persuasion from the government to the defendant in violation of sound and well established principles of constitutional law which govern warrantless searches.

It is a fundamental principle of constitutional law that " . . . searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few and specifically established and well delineated exceptions." *Katz v. United States*, 389 US 347, 357

(1967). One such exception is a border search, which requires no degree of probable cause nor articulable suspicion, being reasonable just by the fact that it occurs at the border, *United States v. Ramsey*, 431 US 606, 616 (1977), provided it is conducted by officials specifically authorized to conduct such a search. *United States v. Soto Soto*, 598 F.2d 545, 549 (9th Cir. 1979) ("Congress and the courts have specifically narrowed the border searches to searches conducted by customs officials in enforcement of customs laws").

Given the "uniqueness" of border searches within the law of search and seizure, *United States v. Alfonso*, 759 F.2d 728, 733 (9th Cir. 1985), the authority to conduct such searches " . . . is not liberally construed." *United States v. Whiting*, 781 F.2d 692, 696 n. 9 (9th Cir. 1986). The Court of Appeals for the Ninth Circuit has gone as far as to state that " . . . a border search not conducted by a customs or immigration officer is, by definition, 'unreasonable.' " *United States v. Vasser*, 648 F.2d 507, 511 n. 3, cert. denied 450 US 928 (1980).

The rationale for such determination is, as expounded in *United States v. Sandoval-Vargas*, 854 F.2d 1132, 1136 (9th Cir. 1988), that:

> The unspoken premise of *Soto-Soto*, a premise which we now expressly endorse, is as follows: Sections 482 and 1581 (of Title 19 USC) represent special delegations of authority to customs officials to conduct border searches. That authority has also been extended to immigration and Coast Guard officials. However, Congress has given the authority to conduct border searches *only* to this limited group of officials, and has charged them with the exclusive responsibility

> for inspecting goods and persons crossing the borders and for interdicting illegal entries. Searches conducted by other law enforcement agents are not considered border searches and must therefore meet the traditional demands of the fourth amendment. (Emphasis in the original; citations omitted.)

It is only Congress who can make such a delegation of authority because, under our constitutional framework, it is Congress who is empowered "(t)o regulate commerce with foreign nations," U.S. Constitution, Art. I, § 8, cl. 3 as cited in *Alfonso*, at 733, and because it is only Congress who can establish the diverse offices of peace officers to be appointed by the executive. Even the vast powers of the executive to enforce the law have limits, *see* generally Tribe, *American Constitutional Law* (Second Edition) § 4-8 and § 4-9, pp. 239-246.

Unlike Guam, to whom Congress has delegated customs authority, *People of Territory of Guam v. Sugiyama*, 846 F.2d 570, 571; reh. denied 859 F.2d 1429 (9th Cir. 1988), "Puerto Rico has no sovereign authority to prohibit entry into its territory; as with all international ports of entry, border and customs control for Puerto Rico is conducted by federal officers." *Torres v. Puerto Rico*, 442 US 465, 473 (1979).

Inasmuch as the search conducted in this case was warrantless it was the government and not the defendant who had both the burden of proof and of persuasion to establish the reasonableness and legality of the search. As the Court in *McDonald v. United States*, 335 US 451, 456 (1948), stated:

> . . . the Constitution requires a magistrate to pass on the desires of the police before they

> violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant *without a showing by those who seek exemption from the constitutional mandate* that the exigencies of the situation made the course imperative. (Emphasis supplied.)

Subsequently, in *United States v. Jeffers*, 342 US 48, 51 (1951), the Court affirmed that in instances where an exemption to the warrant requirement was claimed, " . . . the burden is on those seeking the exemption to show the need for it." That principle was re-affirmed in *Vale v. Louisiana*, 399 US 30 (1970), where the Court stated, at 34, that:

> . . . our past decisions make clear that only in "a few specifically established and well-delineated" situations may a warrantless search of a dwelling withstand constitutional scrutiny . . . *The burden rests on the State* to show the existence of such an exceptional situation. (Citation omitted; emphasis supplied.)

When the preceding teachings are applied to the case at bar it must be concluded that the Court of Appeals erred in its discussion of whether the self-proclaimed functional equivalent was in fact the watch commander. The Court of Appeals held that the term watch commander had lost much use and meaning within the customs service. How could that be so when the term was included in the designation forms of the Commonwealth policemen to act as customs agents which were signed as late as March of 1988, one year prior to the intervention object of this case, is beyond comprehension.

Even more constitutionally unacceptable is the Court of Appeals' statement that the lack of evidence in the

record to establish that any of the superiors of Mr. Jiménez were on duty that night tantamounted to establish the fact that he was indeed the watch commander. The Court of Appeals was, thus, requiring petitioner to offer evidence to establish what a watch commander was and who was that person's identity on the night of the events that led to his indictment and subsequent conviction. In doing so, the Court of Appeals shifted the burden of proof inasmuch as it was the government who had to establish through its case-in-chief those facts in order for the Court to be in a position to conclude that the search had followed the procedure established for the deputization of the Commonwealth policemen as customs officers.

In the absence of that evidence, the Court of Appeals had to reverse the judgment since the District Court had admitted evidence obtained as a result of an unconstitutional and invalid search insofar as it had not been conducted by properly authorized deputized customs officers. *Coolidge v. New Hampshire*, 403 US 443, 473 (1971). For the same reasons, this Court must hold that the search in this case was not valid and that the evidence and the statements had to be suppressed. Thus, the judgment must be reversed.

2. Whether *Caceres* excuses the deviation from strict compliance with Customs Service's regulations for the deputization of Commonwealth law enforcement agents as customs officers.

The first time that the District Court faced the suppression requested by petitioner, it ruled that the Commonwealth policemen were not obliged to follow the

"rigid procedure" established in the deputization documents. (App. 30.) Although the court did not cite any authority for such proposition, it must have been relying on *United States v. Caceres*, 440 US 741 (1979). The Court of Appeals did not face the applicability of *Caceres*, since, as it noted in footnote 4 of its Opinion (App. 15), its "factual finding" precluded the consideration of that issue.[1] Since petitioner contends that said factual finding of the appellate court was clearly erroneous, the issue has to be dealt with.

When the issue is considered, it is evident that *Caceres* does not excuse the strict compliance of the designation requirements in this case. The holding in *Caceres* is a narrow one given the factual situation of that case. The Court was very careful to caution repeatedly throughout its majority opinion that the specific IRS regulation that had not been followed in that case was required by "(n)either the Constitution nor any Act of Congress . . . " (At 744.) At 751, the Court reiterated that " . . . the IRS was not required by the Constitution to adopt these regulations," while highlighting that " . . . the violation of agency regulations disclosed by this record do not raise any constitutional questions." It was precisely for that reason that the Court ruled that the evidence obtained in violation of that regulation did not have to be excluded.

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[1] The Court of Appeals commits clear error every time it refers to the District Court's factual finding as being supported by the evidence, inasmuch as the District Court never made such a finding. See App. 30 and App. 34-35. The District Court's factual determination was quite to the contrary:

> Now, the regulations, the agreement and the deputization forms require that the authorization come from the special agent in charge or the watch commander. There is no question that Mr. Jiménez was not officially either of those. *Id.*

Such an argument can not be sustained in the case of petitioner in as much as, unlike the IRS regulation in *Caceres*, the strict compliance with the Customs regulations, delegations and designations in this case is mandated both by the Constitution and statute. It was so held in *Soto-Soto*, at 550.

As the holding of *Soto-Soto* was later explained in *United States v. Harrington*, 681 F.2d 612, 614 (9th Cir.), cert. denied 105 S. Ct. 2018 (1982):

> A warrantless border search by an FBI agent for general law enforcement purposes falls outside § 482. And when measured against normal fourth amendment standards, the search in *Soto-Soto* was patently unreasonable. Id. at 549. *We approved the suppression of the evidence seized not merely because the search violated a statute, but because the statutory violation undermined constitutional protections.* (Emphasis supplied.)

The exclusion of evidence has also been vouched for in cases where customs officers have conducted searches while exceeding the jurisdiction granted to them by Congress. See *United States v. González*, 874 F.2d 875, 878 (DC Cir. 1989). (" . . . we assume without deciding that statutory authority for the Custom Service's action is essential to the government's use of the resulting evidence.") Cf *United States v. Sarmiento*, 750 F.2d 1506, reh. denied 760 F.2d 281 (9th Cir. 1985) (Dismissal of indictment upheld in case where search was conducted by customs officers in an area not authorized by Congress.)

We can not stress enough the importance from a constitutional point of view that the government be forced to follow closely the requirements established to vest state officers with such broad powers that a customs

officer has. Peace officers of the United States are among those persons who exercise executive authority whose appointment the Constitution allows the Congress to vest in the "Heads of Departments". Article II, § 2[2]. And the Congress has taken particular care to invest the agents of federal law enforcement agents with specific powers to search and arrest: United States marshals, 18 USC § 3053; Federal Bureau of Investigations, 18 USC § 3052; Postal Service personnel and designated officers of the Environmental Protection Agency 18 USC §§ 3061 and 3063, are among those invested by Congress with the dread power to search and to arrest by the authority of the United States. Vesting federal authority to search and arrest in a Commonwealth of Puerto Rico police officer implicates issues of separation of powers within the federal government and interjurisdictional federalism which at the very least require careful adherence to procedure in the delegation and subdelegation of power.

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[2] The second paragraph of Article II, Section 2 states:

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, and other public Ministers and Consults, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The courts must not make it too easy for a police officer who finds himself restricted by the probable cause requirements of Commonwealth law to turn himself into customs searcher, seizer and arrester by working a credential on the basis of a decision made by a customs supervisor who does not know the confines of the authority of the position he says he is acting on. In this case the self-proclaimed "functional equivalent of a watch commander" authorized a search at what the government pressed on the court at trial as the functional equivalent of a border. Unless carefully limited, the power of these customs officers (excepted) in a small island dotted with airports and endowed with numerous bays, can soon turn Commonwealth law and the Fourth Amendment into functional equivalents of dead law.

3. Whether the good faith exception applies to warrantless searches.

When the District Court faced petitioner's renewed motion to suppress, it denied the request based on the good faith exception to the exclusionary rule expressly relying on the case of *United States v. Leon*, 468 US 897 (1984). (App. 35.) In doing so, the Court applied the exception to a warrantless search in open contravention to well established principles.

Since the Court of Appeals held as a matter of fact that there had been no deviation from the procedures established in the designation documents, it did not fact this issue. Had it been faced, the Court, in all probability, would have had to reverse the appealed judgment given

its decision in *United States v. Curzi*, 867 F.2d 36, 44 (1st Cir. 1989), wherein it expressly stated that:

> . . . this court has not recognized a good faith exception in respect to warrantless searches.
>
> . . .
>
> It makes eminently good sense, we suggest, to employ the rule precisely as it has been formulated by the court: as "a good faith exception to searches conducted pursuant to warrants."

As *Curzi* correctly states, the good faith exception to the exclusionary rule was adopted in *Leon* and its companion case, *Massachusetts v. Sheppard*, 468 US 981 (1984), in the context of a search conducted pursuant to a warrant that was subsequently found invalid. Central to the Court's rationale in those two decisions was the intervention of "a detached and neutral magistrate" (*Sheppard*, at 988) between the police conduct and the search. As the court reasoned in *Leon*, at 921:

> (p)enalizing the officer for the magistrate's error rather than his own, cannot logically contribute to the deterrence of the Fourth Amendment violations.

It was determining for the court in *Leon*, at 917, the fact that:

> (j)udges and the magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions.

In *Illinois v. Krull*, 480 US 340 (1987), the good faith exception was extended to cover warrantless administrative searches conducted pursuant to a statute that was latter found to be unconstitutional. Paraphrasing *Leon*,

the *Krull* Court refused to "penaliz(e) the officer for the legislature's error . . . " At 350.

Central to the *Krull* holding, at 350-51, was the fact that legislators were not the target of the exclusionary rule:

> We noted in *Leon* as an initial matter that the exclusionary rule was aimed at deterring police misconduct. 468 US, at 916. Thus, legislators, like judicial officers, are not the focus of the rule. Moreover, to the extent we consider the rule's effect on legislators, our initial inquiry, as set out in *Leon*, is whether there is evidence to suggest that legislators "are inclined to ignore or subvert the Fourth Amendment." Ibid. Although legislators are not "neutral judicial officers," as are judges and magistrates, id., at 917, neither are they "adjuncts to the law enforcement team." Id.

Unlike the law enforcement officers in *Leon* or those in *Krull*, the Police of Puerto Rico officers, who acting as customs officers conducted the search in this case, did so relying on an error committed by an officer of that same law enforcement agency. Agent Jiménez was indeed very much part of the law enforcement team that conducted the search in this case and had a very high stake in the outcome of the criminal prosecution of petitioner. Under these circumstances, the good faith exception should not and can not be applied.

CONCLUSION

For justice we pray so that the cherished Fourth Amendment rights of petitioner be protected and that the exemptions to such an important shield from unreasonable police interventions continue to be restrictively construed for the sake and benefit of all citizens of the land.

Respectfully submitted,

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1991

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 89-2189

UNITED STATES OF AMERICA,
Appellee,

v.

PEDRO R. VICTORIA-PEGUERO,
Defendant, Appellant.

No. 90-1045

UNITED STATES OF AMERICA,
Appellee,

v.

FERNANDO W. ANGLADA ALVAREZ,
Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Jaime Pieras, Jr., *U.S. District Judge*]

Before

Campbell, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
and Selya, *Circuit Judge*.

Luis Rafael Rivera for appellant Pedro R. Victoria-Perguero.

Guillermo Ramos Luina, with whom *Harry Anduze Montano* was on brief, for appellant Fernando W. Anglada Alvarez.

Thomas M. Gannon, Attorney, U.S. Dept. of Justice, with whom *Daniel F. Lopez-Romo*, United States Attorney, and *Jorge E. Vega Pacheco*, Assistant United States Attorney, were on brief, for the United States.

November 27, 1990

SELYA, *Circuit Judge*. When drug runners chance to ask the marine police for weather advisories, it is fairly safe to predict, as these appeals illustrate, that storm clouds will soon gather. The tale follows.

I. BACKGROUND

Appellants Pedro R. Victoria-Peguero (Victoria) and Fernando W. Anglada Alvarez (Anglada) were charged in two counts with violating 46 U.S.C. § 1903(a) (1988) and 21 U.S.C. § 952(a) (1988),[1] and with aiding and abetting,

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[1] The first of the cited statutes reaches, *inter alia*, foreign vessels that enter this country's territorial waters. It provides in pertinent part:

> It is unlawful for any person on board a vessel . . . subject to the jurisdiction of the United States . . . to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

46 U.S.C. App. § 1903(a) (1988). The second statute reaches, *inter alia*, foreign vessels that enter this country's customs water. It provides in pertinent part:

> It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import

(Continued on following page)

18 U.S.C. § 2(1988). The events leading to the indictment began on the evening of November 16, 1988, when a team of law officers led by Alberto Irizarry Carlo (Irizarry) left Cabo Rojo to conduct a routine patrol of Puerto Rican waters. The team, United Forces for Rapid Action, known by its Spanish acronym as "FURA," consisted exclusively of commonwealth police officers: Irizarry, officer Agosto of the Puerto Rico Police Narcotics Division, and four members of the Puerto Rico Police Marine Division (officers Seda, Ronda, Toro, and Torres). The FURA team left shore, heading south, around 7:00 p.m. About half an hour later, they received a radio message from a boat identifying itself as the M/V CATU. The CATU stated that it was traveling from the Dominican Republic to Puerto Rico and wanted to know the weather conditions along the west coast. Irizarry furnished the requested information and, upon inquiry by the CATU, identified himself as a representative of the marine police. He refused, however, to give a specific answer to the CATU's request concerning the FURA boat's location.

In order to avoid the worsening weather, Irizarry changed direction and headed north toward Mayaguez. Around 9:15 p.m., the FURA boat approached the Puerto Real buoy located about one and a half miles from shore. In the vicinity of this buoy, Irizarry and Agosto observed

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(Continued from previous page)

into the United States from any place outside thereof, any controlled substance . . . or any narcotic drug. . . .

21 U.S.C. § 952(a) (1988).

a vessel heading west to east. They confirmed the sighting by radar and slowed down to watch the vessel's approach. Soon, the ship radioed the FURA launch, identified itself as the CATU, and inquired if it was heading in the right direction for Puerto Real. Irizarry responded affirmatively, identified himself as the police, and expressed his intention of pulling alongside in order to check the CATU's documentation. Using a variable range marker, he also determined that the boats were roughly 1.5 miles from land.

After the document inspection, Agosto, acting on Irizarry's orders, radioed the Narcotics Division of the San German police. He asked an officer on duty, Lopez, to request authorization from the United States Customs Service to allow the FURA team to board the CATU. Lopez telephoned the federal customs office immediately, relaying the request to Pacheco, an agent on duty that night. Pacheco referred the matter to William Jimenez, the supervisor of the Customs Service's air smuggling group and the principal coordinator of FURA activities. After studying the situation, Jimenez granted permission to board.[2]

Irizarry and his men then boarded and searched the CATU. During the search, Agosto found approximately 65 kilograms of cocaine secreted behind a load of air-conditioner parts in a hard-to-reach compartment. Anglada, Victoria, and two of their shipmates, Sosa and

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[2] In actuality, the permission was relayed to FURA twice, once through officer Mercado of the Marine Division and again via agent Lopez in San German.

Lora, were arrested. Upon initial interrogation, Anglada made a series of highly incriminating statements.

Eventually, Sosa and Lora became government witnesses. Appellants stood trial and were convicted on both counts. They now appeal. Finding, as we do, that their myriad arguments are no more fortunate than their quest for meteorological advice, we affirm the judgments below.

II. FOURTH AMENDMENT ISSUES

The defendants contend that the evidence seized during the search, as well as Anglada's subsequent inculpatory statements should have been suppressed. They posit three grounds for suppression: (1) the evidence did not support a finding that the search took place at a border; (2) as a matter of law, the members of the FURA team could not act as customs agents; and (3) as a matter of fact, the officers were not authorized so to act. We find this asseverational array to be unconvincing in all its aspects.

A. Border Searches.

It is axiomatic that warrantless searches are *per se* unreasonable unless they fall within a recognized exception to the warrant requirement of the fourth amendment. It is equally well established that border searches constitute such an exception and are reasonable "by the single fact that the person or item in question had entered into our country from outside." *United States v. Ramsey*, 431 U.S. 606, 619 (1977).

The sea boundary of United States territory is a marine league (three geographic miles) from shore, *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923), and comprises a border for fourth amendment purposes. *See United States v. Zurosky*, 614 F.2d 779, 787 n.7 (1st Cir. 1979), *cert. denied*, 446 U.S. 967 (1980); *see also United States v. Stanley*, 545 F.2d 661, 666 n.6 (9th Cir. 1976), *cert. denied*, 436 U.S. 917 (1978). Because it is not practical to set up checkpoints at the outer perimeter of a country's territorial waters, courts have consistently recognized the constitutionality of warrantless searches at the functional equivalent of the sea border, *see, e.g., United States v. MacPherson*, 664 F.2d 69, 72 n.2 (5th Cir. Unit B Dec. 1981) (three and one half miles from shore is functional equivalent of border); *United States v. Tilton*, 534 F.2d 1363, 1365-66 (9th Cir. 1976) (harbor as functional equivalent of border); *see generally Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973), as long as those searches satisfy the constitutional requirement of reasonableness.

Beyond the three mile limit, Congress has designated the "customs waters" of the United States, 19 U.S.C. § 1401(j) (1988), and authorized federal customs officers to search vessels within those waters, i.e., within twelve miles of shore:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs water or, . . . at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, truck, package, or cargo on board, and to this end may hail and stop such vessel or vehicle,

> and use all necessary force to compel compliance.

19 U.S.C. § 1581(a) (1988). A border search conducted pursuant to section 1581(a) is one of the approved exceptions to the warrant requirement of the fourth amendment. *Zurosky*, 614 F.2d at 787. While it is uncertain what the geographic limits of a seagoing border search may be, the assumption most favorable to appellants is that the evidence must support a finding that the vessel crossed into territorial waters in order to uphold a governmental incursion as a border search. *Id.* at 787-88.[3]

Here, the trial court determined that the CATU was within territorial waters when it was hailed. We review such a finding under the clearly erroneous rule. *See, e.g., United States v. Aguirre*, 839 F.2d 854, 857 (1st Cir. 1988) (factfinding on suppression motion subject to clear-error review); *United States v. Figueroa*, 818 F.2d 1020, 1024 (1st Cir. 1987) (same). The evidence was in some disarray. Irizarry, for example, testified that the boats were 1.5 miles from shore (well within the territorial limit) and

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[3] Adopting this assumption eliminates any occasion for us to examine the fourth amendment implications of a warrantless search taking place in the intermediate area between territorial waters (three miles) and customs waters (12 miles). Although we need not decide the question here, we note suggestions elsewhere that this intermediate area may be considered the functional equivalent of the border. *See MacPherson*, 664 F.2d at 72 n.1; Note, *High on the Seas: Drug Smuggling, the Fourth Amendment and Warrantless Searches at Sea*, 93 Harv. L. Rev. 725, 731-38 (1980). Were we to adopt such a suggestion, the conflicting testimony as to the distance from shore would be of no import and any issue as to the exception's applicability would vanish.

substantiated this statement by reference to his use of the variable range marker. Sosa, on the other hand, testified that the search of the CATU took place 6.5 miles from shore. Such sharp conflicts in the evidence are grist for the trial court's mill. Given the amply evidentiary predicate, we cannot say that the court below erred in finding that the two boats were only 1.5 miles from shore when the boarding occurred or in ruling that the search took place at the functional equivalent of a border.

B. Legality of Designation.

Appellants' second contention is that, as a matter of law, the FURA officers could not be designated as customs officers and, therefore, could not conduct a border search. 19 U.S.C. § 1401(i) (1988) defines "customs officer" in connection with searches conducted pursuant to section 1581(a) as:

> [A]ny officer of the United States Customs Service of the Treasury Department . . . or any commissioned, warrant, or petty officer of the Coast Guard, or any agent *or other person authorized by law or designated by the Secretary of the Treasury* to perform any duties of an officer of the Customs Service.

19 U.S.C. § 1401(i) (emphasis supplied). On its face, then, the statute provides that any person may act as a customs officer, subject only to the limitation of proper delegation. What scant case law there is mirrors this commonsense reading of the statute's plain language. *See, e.g., United States v. Thompson*, 475 F.2d 1359, 1362 (5th Cir. 1973) ("By a series of proper delegations, border patrol officers have

been designated by the Treasury Secretary as customs agents.").

Without pointing to any other statutory provision indicating a congressional intent to exclude non-federal actors (in this case, Puerto Rico police officers) from eligibility for designation under section 1401(i), appellants ask us in effect to read the words "other person" out of the statute. We will not bow to their wishes. It is black letter law that "[a]ll words and provisions of statutes are intended to have meaning and are to be given effect." *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751 (1st Cir. 1985). There is every reason to honor the principle here. *Cf., e.g., Camacho v. Autoridad de Telefonos*, 868 F.2d 482, 489-90 (1st Cir. 1989) (affording broad construction to phrase "other persons" as used in 18 U.S.C. § 2511(2)(a)(ii)). Accordingly, we decline to substitute judicial judgment for legislative judgment or to place limitations on section 1401(i) which were not envisioned by Congress.

Appellants' best selling point to the contrary is that our literalistic reading of section 1401(i) is arguably at variance with the Ninth Circuit's position as articulated in *United States v. Sandoval Vargas*, 854 F.2d 1132 (9th Cir.), *cert. denied*, 488 U.S. 912 (1988). In *Sandoval Vargas*, the panel stated:

> Section[ ] . . . 1581 represent[s a] special delegation[ ] of authority to customs officials to conduct border searches. That authority has also been extended to immigration and Coast Guard officials. However, Congress has given the authority to conduct border searches *only* to this limited group of officials, and has charged them with the exclusive responsibility for inspecting

> goods and persons crossing the borders and for interdicting illegal entries. Searches conducted by other law enforcement agents are not considered border searches, and must therefore meet the traditional demands of the fourth amendment.

Id. at 1136 (dictum; citations omitted). Unlike the appellants, however, we do not understand the Ninth Circuit to be attempting to define the term "customs officials" more narrowly than it is defined in section 1401(i). Where Congress, without exceeding its constitutional powers, has set descriptive parameters, courts must follow them – not presume to compose other or different definitions. Thus, in explicating section 1581, the *Sandoval Vargas* court must be understood to have adopted the related statutory definition of customs officer as contained in section 1401(i), if only *sub silentio*.

Our understanding of *Sandoval Vargas* is fortified by an analysis of the opinion as a whole. In that case, the court upheld a border search conducted by customs officials. *Id.* at 1133. The quoted passage is dictum, merely echoing the holding of *United States v. Soto-Soto*, 598 F.2d 545 (9th Cir. 1979). In *Soto-Soto*, a search was conducted by an FBI agent unconnected to the customs service in the course of an FBI operation. *See id.* at 549-50 (the search "was made at the border by an FBI agent as part of a general law enforcement effort . . . [the agent] was not working in cooperation with customs agents") (citations omitted). The *Soto-Soto* court held that, on those facts, the search, although conducted at a border checkpoint, was not a border search, and hence, invalid. *Id.* at 549-50.

The facts in the instant case are radically different. The FURA officers were not freelancers, but were part of a coordinated customs effort designed to prevent the importation of illegal drugs. When Irizarry's team boarded the CATU, they knew that the boat had not gone through customs; their sole purpose was to conduct a customs search. The defendants cannot seriously contend that the FURA team was operating as part of a non-customs-related venture or that it was not cooperating with the Customs Service.

Defendants' second sales pitch is even more strained. They urge that *Torres v. Puerto Rico*, 442 U.S. 465 (1979), prohibits reading section 1401(i) to permit Puerto Rico police officers to accept designation as federal customs officers. We cannot agree. *Torres* stands for the unremarkable proposition that, because Puerto Rico lacks sovereign authority to prohibit entry into its territory, border searches in the commonwealth must be conducted by federal officials. *Id.* at 473. A Puerto Rico police officer cross-designated as a customs officer pursuant to 19 U.S.C. § 1401(i) and duly authorized to act as such, however, is a federal officer while acting within the scope of the designation and authorization. He may, therefore, conduct border searches, notwithstanding the *Torres* mandate.

We conclude that, given a valid chain of delegation from the Secretary of the Treasury, Puerto Rican police officers could, as a matter of law, be designated to act as customs officers under the "other person" language of section 1401(i). This leaves open the question, to which we now turn, of whether the delegation was proper in this case as a factual matter.

C. Validity of the Delegation.

Appellant contends that, even if the FURA officers could, as a matter of law, be cross-designated as customs officials, they were not duly designated in this instance. Our odyssey along the chain of delegation begins with the statute, which provides for designation by the Secretary of the Treasury. 19 U.S.C. § 1401(i). From aught that appears, the appellants have conceded the propriety of the Secretary's delegation of this authority through the Commissioner of Customs to the Regional Commissioners. Treasury Department Order No. 165, Revised, 19 Fed. Reg. 7,241 (T.D. 53654 (1954)); Customs Delegation Order No. 48, 38 Fed. Reg. 30,455 (T.D. 73-302 (1973)). The Regional Commissioner having jurisdiction in Puerto Rico was George Heavey.

The evidence indicated that Heavey, on behalf of the Customs Service, entered into an agreement with the Puerto Rico police regarding "Designation of Employees of the Puerto Rico Police Department as Customs Officers." Under the agreement, Puerto Rico police officers, after being trained by Customs, would be designated as "customs officers (expected)." They could operate as federal customs officers subject to certain strictures. For our purposes, the most relevant constraint was

> that Customs officer designations to employees of the Puerto Rico Police Department [ ] be used only in situations when there was been specific advance approval by the Customs Watch commander and only to the extent approved by the Customs Watch Commander and for the duration of the specific law enforcement activity for which the approval was gained.

Agreement ¶ B(2). In line with this constraint, the designation forms received by Irizarry, Agosto, and their fellow officers stated that they could only act as customs officers "[w]hen authorized by the U.S. Customs Service Special Agent-in-Charge or Watch Commander."

Appellants start their efforts to unlink the chain of delegation by questioning the tensile strength of these documents. As to the inter-agency agreement, appellants make much of the fact that the copy produced by the government before trial was not countersigned by a representative of the Puerto Rico police department. This perceived weakness is easily overcome; a duly countersigned copy of the agreement was entered into evidence at the trial. Next, the defendants hypothesize that the individual officers' designation forms were invalid because Heavey's signature was merely a rubber stamp. We hold that the validity of the designation is not affected by the fact that the designating officer's signature was mechanically reproduced. *Accord United States v. Prueitt*, 540 F.2d 995, 1001 n.1 (9th Cir. 1976) (dispute over whether document was "signed" or "stamped" is unimportant with respect to legality of authorization), *cert. denied*, 429 U.S. 1063 (1977). What matters, we suggest, is that the imprint implemented Heavey's avowed intention; in an affidavit submitted to the district court and not contradicted by other evidence, Heavey stated that the stamp represented his signature and that he authorized its affixation, intending to deputize the officers.

A somewhat closer question stems from appellants' assertion that the FURA officers never obtained permission from the Customs Service "watch commander" before searching the CATU. The title had apparently

fallen into some degree of desuetude within the Customs Service: the record does not show that there was any "watch commander" denominated as such in Puerto Rico on the night in question. Moreover, none of the parties points to a statutory or regulatory definition of "watch commander" within the Customs Service, nor have we found one. For lack of a better alternative, we accept the commonsense definition proffered on Anglada's behalf at oral argument that a watch commander is "the officer in charge at the time."

The policemen's designation forms offered two possible sources of approval for specific actions: the "Special Agent-in-Charge" or "Watch Commander." The government admits that no permission was obtained from the Special Agent-in-Charge, Jaime Echevarria. Instead, it was agent Jimenez who authorized the search. Jimenez testified that, when he received the call requesting permission to board the CATU, he was the "functional equivalent" of a watch commander. Defendants argue that this is an inherently implausible conclusion since Jimenez was not at a duty station but attending a baseball game when the call was received. Such an argument, however, takes much too parochial a view of command status. The evidence showed that Jimenez was wearing a beeper as part of his work-related duties while at the ball game; that he responded immediately to the beeper signal; and that he made several telephone calls to ascertain the circumstances and details of the request. Ultimately, he sanctioned the search. All of these actions were entirely consistent with the idea that Jimenez was the person in charge at the critical moment. Moreover, the absence of evidence that any higher ranking customs official was

then on duty bolsters the district court's finding that Jimenez was, indeed, the functional equivalent of a watch commander.

In the last analysis, this finding deserves considerable deference on appeal. Inasmuch as it responded to a mixed question of fact and law, that is, a question which "ask[ed] nisi prius to determine whether certain factors possess, or lack, legal significance in a given case," *Roland M. v. Concord School Comm.*, 910 F.2d 983, 990 (1st Cir. 1990), we review it under the clearly erroneous standard. *See id.*; *see also Sweeney v. Board of Trustees*, 604 F.2d 106, 109 n.2 (1st Cir. 1979) (collecting cases), *cert. denied*, 444 U.S. 1045 (1980); *cf., e.g., Figueroa*, 818 F.2d at 1024 (applying clearly erroneous standard to district court's determination of probable cause). There is no principled way in which we can disturb the district judge's finding that, on a preponderance of the evidence, the officers had obtained permission to board from the "watch commander."[4]

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[4] Since we uphold the district court's factual finding that permission was granted by the watch commander or his functional equivalent, and thus, that there was no deviation from the Customs Service's protocol governing how boarding permission should be granted to designees, we need not consider the government's alternate argument that, under *United States v. Caceres*, 440 U.S. 741 (1979), and its progeny, any breach of the protocol would not have sufficed to invalidate the delegation of authority.

III. JURY EMPANELMENT

There are a pair of assigned errors that touch upon jury empanelment. We consider them in the order of their relative importance.

A. Voir Dire Questions.

At the voir dire, the defendants requested that the court ask prospective jurors whether they would give greater credence to the testimony of government agents.[5] The district judge refused the request, believing that the proposed questions were encompassed in his general inquiry. Defendants now argue that this refusal constituted reversible error.

Where government agents are apt to be key witnesses, the trial court, particularly if seasonably requested, should ordinarily make inquiry into whether prospective jurors are inclined to have greater faith in the agents' testimony merely by virtue of their official positions. *See United States v. Anagnos*, 853 F.2d 1, 3 (1st Cir. 1988); *United States v. Pappas*, 639 F.2d 1, 4-5 (1st Cir.

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[5] The exact text of the proposed questions was as follows:

1. Do you believe that government agents always say the truth?

2. Do you feel that the testimony of a government agent must be given more weight or credibility than that of other person[s] who are not government agents?

3. Do you believe that government agent[s] because of their official position are always objective individuals?

4. Do you believe that government agents because of their official position always perform their actions properly?

1980), *cert. denied*, 451 U.S. 913 (1981). The phrasing of the inquiry, of course, is up to the judge, *see Ham v. South Carolina*, 409 U.S. 524, 527 (1973), but the failure to make any inquiry at all is usually considered to constitute error. *Anagnos*, 853 F.2d at 2-3; *but cf. Therrien v. Vose*, 782 F.2d 1, 4 (1st Cir.) ("*In certain circumstances*, the refusal of a judge to ask prospective jurors questions designed to weed out [pro-government] bias *may* be reversible error.") (emphasis supplied), *cert. denied*, 476 U.S. 1162 (1986). Whether or not such an error necessitates reversal hinges on such factors as

> the importance of the government agent's testimony to the case as a whole; the extent to which the question concerning the venire person's attitude toward government agents is covered in other questions on voir dire and on the charge to the jury; the extent to which the credibility of the government agent-witness is put into issue; and the extent to which the testimony of the government agent is corroborated by non-agent witnesses.

Pappas, 639 F.2d at 5 (quoting *United States v. Baldwin*, 607 F.2d 1295, 1297-98 (9th Cir. 1979)).

Here, the government's case was based largely on agents' testimony; public employees testified as to the chain of requested authorization, the boats' distance from shore, the boarding, the search, the contraband's discovery, and Anglada's post-arrest statement. This was certainly a case where the requested queries – or queries like them – could usefully have been propounded. On balance, there was enough that the court, we believe, should have yielded on that point. The more general questions

posed by the district judge, while solicitous of the defendants' rights, cannot fairly be read to subsume or replace the requested inquiries.

We rule, however, that the district court's mistake did not amount to reversible error. For one thing, the government's case was very strong. For another thing, the agents' testimony was largely corroborated by two of appellants' shipmates testifying under an agreement with the government.[6] For a third thing, many of the matters on which the agents' testimony was hotly disputed, e.g., the voluntariness of Anglada's post-arrest statement, Jimenez's duty status, the facts anent suppression, were resolved by the judge, not the jury – and the voir dire inquiry was irrelevant insofar as the judge was the fact-finder. As to certain other fact-oriented matters, e.g., the scienter question raised by Victoria, *see infra* Part V(B), the issue was less the veracity of government agents –

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[6] Although our precedents leave the import of corroboration somewhat murky in this type of case, *compare Pappas*, 639 F.2d at 5 (corroboration is an element to be considered) *with Anagnos*, 853 F.2d at 4 (questioning whether credibility problems of government agents can be erased by corroboration from other witnesses), we are of the opinion that, in a harmless-error inquiry which must ultimately depend on probabilities, *cf. United States v. Ladd*, 885 F.2d 954, 957 (1st Cir. 1989) (where error not of constitutional dimension, reversal unnecessary so long as it is "highly probably" that the error did not affect the outcome); *United States v. Hernandez-Bermudez*, 857 F.2d 50, 53 (1st Cir. 1988) (same), the presence or absence of corroborative evidence is a factor deserving of weight.

indeed, Sosa was the principal witness on this point – than the legal purport and sufficiency of a set of facts. Last but surely not least, a potent antidote to potential prejudice was twice administered by the court below. Immediately after the jury was empaneled and before the opening statements, the judge told the jurors:

> So I am going to instruct you now that the Government is to call several witnesses who are . . . government agents. Their testimony must not be given more weight or credibility than that of other persons who are not government agents. Remember that.

During the charge, the judge hammered the point home:

> Remember, as I told you before, that government agents are entitled to no more credibility than any other witness.

These theriacal instructions, coming at both the beginning and end of the trial, were sufficient to counter any harm caused by the judge's omission of the requested voir dire inquiries. *See United States v. Noone*, 913 F.2d 20, 33-34 (1st Cir. 1990) (correct jury instructions at close of trial cured whatever mistaken impression was left at voir dire); *United States v. Gelb*, 881 F.2d 1155, 1164-65 (2d Cir.) (error in refusing voir dire questions found harmless where, *inter alia*, court properly charged jury about assessing credibility of law enforcement witnesses and incriminating testimony did not come exclusively from those witnesses), *cert. denied*, 110 S. Ct. 544 (1989); *Pappas*, 639 F.2d at 4-5.

B. The Jury Pool.

Defendant Victoria objects to the method by which the venire was summoned for jury service – in particular, to the jury clerk's decision, in the face of a shortfall in the jury pool, to summon by telephone six jurors who had finished their normal term of jury service two years earlier.[7] He claims that this practice deprived him of his sixth amendment right to a jury representative of a fair cross-section of society.

We need not linger long over this objection. The six recycled venire persons were identified as potential jurors according to a neutral, nondiscriminatory criterion: completion of a month's jury service in the court more than two years before. We have examined much this same question before, *United States v. Ramirez*, 884 F.2d 1524 (1st Cir. 1989), and determined that the practice constituted neither a constitutional abridgment nor a substantial violation of the Jury Selection and Service Act, *id.* at 1529-30, even where the recycled jurors were not, as here, *ordered* to appear but merely *requested* to appear. *Ramirez*

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[7] What transpired was so much like what happened in *United States v. Ramirez*, 884 F.2d 1524 (1st Cir. 1989), a case arising in the same district at about the same time, that no useful purpose would be served by reciting the details. Instead, we refer the interested reader to Judge Bownes' lucid account of how the venire was augmented. *Id.* at 1525-27, 1530. The only significant difference cuts in favor of the government: whereas "extra" talesmen in *Ramirez* were given the option to appear, *id.* at 1525, the six "extra" venire persons in this case were given no choice.

controls. The fair cross section requirement was in no way frustrated.[8]

IV. THE CHARGE

A defendant is entitled to an instruction on his theory of defense so long as it is a valid theory and there is evidence sufficient for a reasonable jury to find in his favor on it. *Mathews v. United States*, 485 U.S. 58, 63 (1988); *United States v. Rodriguez*, 858 F.2d 809, 813 (1st Cir. 1988). He is not, however, entitled to instructions on matters that are properly decided by the court rather than the jury.

In this wise, appellants contend that the district judge improperly refused to instruct the jury to acquit if it found that agent Jimenez was not the watch commander. We disagree. The question whether Jimenez was the watch commander was a factual determination to be made as part of the fourth amendment inquiry rather than an element of the substantive offenses with which the defendants were charged. The admissibility of evidence acquired during a search is a question for the trial judge and outside the province of the jury. *See Lego v. Twomey*, 404 U.S. 477, 490 (1972). The judge, therefore, correctly declined defendants' invitation to submit the question to the jury. *See United States v. Donaldson*, 793

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[8] While not necessary to our result, we note in passing the record does not show that any of the six recycled venire persons actually served on appellants' petit jury (although one was called as an alternate).

F.2d 498, 503 (2d Cir. 1986) (instruction properly refused where it "would have, in essence, put to the jury the issue of [defendant's] assertion of his perceived fourth amendment rights after the district court had properly decided [that issue]"), *cert. denied*, 479 U.S. 1056 (1987).

V. EVIDENTIARY SUFFICIENCY

Victoria attacks the sufficiency of the evidence in three respects, maintaining (1) that the evidence did not support a finding that the CATU was searched within territorial waters; (2) that the evidence was insufficient to establish Victoria's knowledge and intent; and (3) that a rational juror could not find that Jimenez was the watch commander. The arguments are sheer persiflage.

In reviewing the lower court's denial of a motion for judgment of acquittal under Fed. R. Crim. P. 29, we consider the evidence as a whole in the light most favorable to the government. *E.g., United States v. Jimenez-Perez*, 869 F.2d 9, 10 (1st Cir. 1989); *United States v. Ingraham*, 832 F.2d 229, 239 (1st Cir. 1987), *cert. denied*, 486 U.S. 1009 (1988). The government may prove its case entirely by circumstantial evidence and need not exclude every reasonable hypothesis of innocence, provided the record as a whole supports a conclusion of guilt beyond a reasonable doubt. *Ingraham*, 832 F.2d at 239-40; *United States v. Smith*, 680 F.2d 255, 259 (1st Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983). We apply these criteria to Victoria's challenges.[9]

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[9] We need not discuss in this context Victoria's assertion that the evidence was too lean to prove that Jimenez was the watch commander. As mentioned above, *see supra* pp. 13-15, the proof was adequate; and in any event, the question was not one for the jury, *see supra* Part IV.

A. Territorial Waters

Although the location of the CATU had jurisdictional implications to be decided by the court, *see supra* Part II(A), it was also a material element of both offenses of conviction, *see supra* note 1, and as such, had to be decided anew by the jury. *See United States v. Maynard*, 883 F.2d 918, 926 n.4 (1st Cir. 1989); *United States v. Potes*, 880 F.2d 1475, 1478 n.1 (1st Cir. 1989).

At the bottom line, Victoria gains nothing by this double dip. The jury's resolution of the point in a manner favorable to the prosecution cannot be faulted. The testimony of Irizarry and Agosto that the CATU was 1.5 miles from shore, although contradicted by other testimony, was enough to sustain the verdict. *See United States v. Passos-Paternina*, No. 89-1396, slip op. at 10 (1st Cir. Oct. 24, 1990) (appellate court must "resolve issues of credibility in favor of the verdict"). Taking the evidence in the light most favorable to the government, we cannot say that a rational juror could not decide to credit the testimony of the FURA officers on this issue.[10]

B. Scienter.

As to Victoria's knowledge and intent, the verdict is unimpugnable. Defendants' shipmate, Sosa, testified that Victoria initially consulted him about buying a new boat;

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[10] A finding that the CATU was 1.5 miles from shore would satisfy not only 46 U.S.C. App. § 1903(a), which requires that the boat be within territorial waters, but also 21 U.S.C. § 952(a), which only requires presence within the customs waters.

that Sosa, Victoria, and Anglada together went looking for a craft and ultimately decided to purchase the CATU; that Victoria helped to repair the boat before departure from the Dominican Republic; that Victoria was the one who asked Sosa to pilot the boat to Puerto Rico; that Victoria helped load the air-conditioning equipment behind which the cocaine was found; and that Victoria was the one who paid Sosa for his services. In sum, there was much more here than mere presence; a rational juror could easily conclude that Victoria had full knowledge of the illicit cargo and was a prime mover in the scheme to import the cocaine into the United States. Furthermore, the same evidence was fully adequate to support Victoria's conviction as an aider and abettor under 18 U.S.C. § 2. *See Smith*, 680 F.2d at 260.

The Rule 29 motion was appropriately denied.

VI. POTPOURRI

Appellants raise a medley of other contentions that, for the most part, can be rejected without specific comment. We briefly mention two of them.

A. The Motion for Continuance.

Victoria contends, in a single unsupported sentence at the end of his brief, that the district judge should have granted his motion for a continuance because of the last-minute plea agreement between the government and Victoria's shipmates, Sosa and Lora – a pact which resulted in the two crewmen testifying for the prosecution.

The plaint is meritless for two reasons. First, it is so undeveloped that we can consider it jettisoned. *See Ryan v. Royal Ins. Co.*, No. 90-1217, slip op. at 7 (1st Cir. Sept. 27, 1990) ("issues adverted to on appeal in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been abandoned"); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.) (same), *cert. denied*, 110 S. Ct. 1814 (1990). Second, we have consistently accorded trial judges broad latitude in making on-the-spot judgments as to granting or denying continuances. *See, e.g., United States v. Devin*, No. 89-1170, slip op. at 25 (1st Cir. Nov. 6, 1990); Zannino, 895 F.2d at 13-15; *Real v. Hogan*, 828 F.2d 58, 63 (1st Cir. 1987). The record on appeal reflects no misuse of this leeway.

B. The Post-Arrest Statement.

Anglada challenges the government's use of his post-arrest statement on two grounds. He claims, first, that the statement should have been suppressed as the fruit of the allegedly illegal search of the CATU. But, since we have upheld the search, *see supra* Part II, he cannot prevail on this ground. *See Colorado v. Spring*, 479 U.S. 564, 571-72 (1987) ("[a] confession cannot be 'fruit of the poisonous tree' if the tree itself is not poisonous").

Anglada's second claim is that the statement was involuntary. The record belies the assertion. Before speaking to the agents, Anglada was advised of his rights, said that he understood them, and signed a waiver. The record does not even hint at the existence of circumstances showing that his will was overborne because of coercive police conduct. *See Culombe v. Connecticut*, 367 U.S. 568,

602 (1961) (discussing factors relevant to assessment of voluntariness). Rather, Anglada gratuitously alerted the officers anent his willingness to discuss the smuggle, responded without equivocation to their interview request, and stated repeatedly that he wanted to cooperate. To be sure, there was evidence that Anglada appeared tired and nervous, and expressed fear that his cooperation could put him at risk – but in the absence of police overreaching, such factors do not conclusively establish involuntariness. *See, e.g., Colorado v. Connelly*, 479 U.S. 157, 163-67 (1986). The district court did not err when it declined to suppress the statement on this basis.

VII. CONCLUSION

To recapitulate, we conclude that the district court did not err in determining that the search of the CATU was a valid border search conducted by persons duly deputized to act as federal customs officers. The judge's unwillingness to quiz prospective jurors about their receptiveness to "official" witnesses was error, but benign under the circumstances of the case. The jury instructions were acceptable, the evidence of defendants' guilt was solid, Victoria's motion for a continuance was properly denied, and Anglada's post-arrest statement was appropriately admitted. None of the other challenged rulings warrant reversal.

We need go no further. Inasmuch as appellants' flotilla of assigned error cannot ride out the storm, we direct that their convictions be

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA Plaintiff	•	
vs.	•	CRIMINAL NO.
FERNANDO WALDEMAR ANGLADA ALVAREZ, PEDRO RADAMES VICTORIA PEGUERO, JAIME LORA RIVERA, and ERNESTO SOSA Defendants	•	88-465 (JP)

ORDER

Defendant Anglada has filed an extensive opposition to the magistrate's report and recommendation regarding the suppression of evidence in this case. Defendants Sosa and Victoria have filed motions joining Anglada's arguments, and Defendant Lora has filed a motion based largely on the arguments stated by Anglada.

On April 18, 1989, United States Magistrate Schmidt-Monge recommended that the motions to suppress be denied. The defendants claim that the magistrate erred in four respects: 1) he determined that the scheme for deputizing Puerto Rico police officers as agents of the United States Customs Service is legal and constitutional; 2) he

found that the police agents in this case were properly authorized to board the ship (M/V CATU) by the customs authorities; 3) he found that the CATU was within the jurisdiction of the United States when searched; and 4) he neglected to address defendant Anglada's claim that his confession was not voluntary.

I. The Constitutionality of Deputizing the Officers

The defendants claim that the delegation of authority to Officers Irizarry, Agosto, and Seda is infirm in three respects. First, they argue that only Congress can authorize such actions, not the Regional Commissioner of the Customs Service. Section 1401(i) of Title 19, however, constitutes Congress' delegation of such appointment authority to the Secretary of the Treasury. The actions of Regional Commissioner Heavey in designating the police officers as customs officers are proper under the Regional Commissioner's re-delegated authority.

Second, the defendants argue that because the "Memorandum of Understanding Between the Puerto Rico Police Department and the U.S. Customs Service Regarding the Designation of Employees of the Puerto Rico Police Department as Customs Officers" (Defendant's Exhibit L, Suppression Hearing) is signed only by a representative of the Police Department, and not by a representative of the Customs Service, there has been no effective designation of these officers. The defendants misinterpret the import of the "Memorandum." The "Memorandum" comprises the understanding of the two agencies with respect to designation; it is not, itself, the designation of any officer. Those designations are made

on Customs Form 55. See Defendant's Suppression Hearing Exhibits M, N, and O, which constitute the designations of the three officers.

Finally, the defendants claim that three designations on Customs Form 55 ["Designation, Customs Officer (Excepted)"] are not personally signed by a representative of the Customs Service and are therefore invalid. No authority is cited for this novel proposition, and there appears to be no valid basis for challenging the designations. *See United States v. Prueitt*, 540 F.2d 995 (9th Cir. 1976). The Court therefore finds that officers Irizarry, Agosto, and Seda were properly designated customs officers at the time they searched the CATU.

II. The Authority to Board

The magistrate concluded that the "agents on board the police boat requested and obtained authorization from U.S. Customs Central Office in San Juan to board, inspect documents and conduct a border entry search at the site as deputized U.S. Customs agents." Magistrate's Report and Recommendation (April 18, 1989) at 10. The defendants argue that this conclusion is erroneous because the testimony of various witnesses is so inconsistent that they must have been attempting to "validate and justify the search by the police agents after it had been performed without any authority whatsoever." Anglada brief (July 3, 1989) at 6.

The premise for the defendants' argument is that the failure to obtain prior authorization from the U.S. Customs Service makes the subsequent search illegal. The

defendants refer to both the Customs Forms 55 (Defendant's Exhibits H, M, and N, Suppression Hearing) and the "Memorandum of Understanding" (Defendant's Exhibit L, Suppression Hearing), which indicate that the duties of the Designated Customs Officers are to conduct surveillance, boardings, searches, and arrests when authorized by the Customs Service. They also establish a procedure for gaining specific, advance approval for exercising these duties.

Although the record adequately supports the Magistrate's conclusion that such advance approval was gained in this case, the Court need not decide that question at this point. Under 19 U.S.C. § 158(a), "any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters . . . and search the vessel. . . . " The defendants' exhibits do not constitute a rigid procedure that must be followed before the state police officers can gain their status as "officers of the customs." That status is conferred by § 1401(i) and the Customs Forms 55. This status permits the officers to conduct border searches with or without specific, advance approval – although the preferred practice is to obtain such approval, and an officer's designation is subject to revocation if abused, see Defendant's Exhibit L, Suppression Hearing.

The Court therefore finds Officers Irizarry, Agosto, and Seda were sufficiently authorized to act as customs officers and to conduct a border search at the time they boarded the CATU.

III. The High Seas

The magistrate concluded that the CATU was intercepted about one-and-one-half miles off shore from Puerto Real, Puerto Rico, well within the customs waters of the United States, *see* 19 U.S.C. § 1401(j). This conclusion is based on consistent testimony that the interception occurred near buoy number 4, which is undisputedly within the customs waters. The defendants argue, however, that the time required for the two ships to return to Boqueron (two to three hours) compels the conclusion that the interception actually occurred about eight miles from shore. They also argue that the Personal History Reports filled out by Agent Nieves state that the place of arrest was "High Seas Southwest Cabo Rojo, PR."

The Court has reviewed the record and concludes that the evidence amply supports the magistrate's conclusion that the CATU was close to buoy number 4 when it was seized. The Court finds, therefore that the CATU was within the customs waters of the United States, and the border search was proper.

IV. Anglada's Post-arrest Statement

Defendant Anglada claims first that his post-arrest statement should be suppressed as a fruit of the illegal search and seizure of the CATU. Because the Court has found no infirmity with the search, the motion to suppress on this basis must be denied. The defendant argues, in the alternative, that his statements were nonetheless involuntary and that, in any event, the Magistrate failed to consider his contention in the Report and Recommendation.

The Magistrate's Report includes numerous factual findings related to the defendant's claim of involuntariness; the magistrate nevertheless failed to reach any conclusions other than that implicit in his denial of the motion to suppress. Specific findings and rulings are not, however, required to uphold a determination of voluntariness on appeal. *United States v. Payton*, 615 F.2d 922, 923 (1st Cir. 1980).

The magistrate noted that the Miranda warnings were given and that during the interview with police agents, Anglada looked tired and nervous, but did not seem sleepy nor say that he had been threatened. Anglada did express a fear for his life and the welfare of his family. Defendant Victoria, apprehended along with Anglada, chose to remain silent while waiting for an attorney.

Anglada's Motion to Suppress, which the Magistrate denied, was based only on the claim that no *Miranda* warnings were given to Anglada. The magistrate properly found to the contrary. The basis stated in this appeal, involuntariness, was not presented to the Magistrate, and it should be considered as waived. Fed. Rule Crim. Pro. 12(f). Nevertheless, the Court has carefully reviewed the record for indications of involuntariness, and the Court concludes that the defendant was informed of his rights, he understood them, and he voluntarily, knowingly, and intelligently waived them. *See Payton*, 615 F.2d at 924, citing *North Carolina v. Butler*, 441 U.S. 369 (1979).

The court therefore follows the Magistrate's Report and Recommendation in its entirety, and the motions to suppress are DENIED.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 10 day of July, 1989.

/s/ Jaime Pieras
JAIME PIERAS, JR.
U.S. DISTRICT JUDGE

APPENDIX C

(Excerpts from official transcript containing ruling rendered by Court from bench on July 21, 1989)

[p. 813] THE COURT: Very well. The Court is ready to rule.

The ruling on the suppression that we have made several times, but that now it was brought again because we have heard [p. 814] all of the evidence and it was well brought before the attention of the Court again, I say that the standard is one of preponderance of the evidence and this is an issue for the Court and not for the jury.

The first issue with regard to the search is whether the police officers were validly appointed. I find that they were; that their documents were in order and properly signed by the regional commissioner.

Next, were the officers authorized to conduct the specific boarding and search prior to conducting it? As to the timeliness issue, there were very conflicting stories about time, in the sense of clock time. But there was really no conflict in the testimony about the order of the events. It is clear to me that the officers received authorization to board prior to boarding.

Now, nevertheless, if the U.S. Attorney agrees to have this matter go to the jury, we will. We will allow the attorneys for the defendants to argue whether Jimenez authorized these police officers or not to board the CATU.

Now, the regulations, the agreement and the deputization forms require that the authorization come from the special agent in charge or the watch commander. There is no question that Mr. Jimenez was not officially either of

these, and that it was he who gave the authorization. I do not have to reach the issue of whether he can give the authorization as the [p. 815] functional equivalent of a watch commander because I hold that the good faith exception to the exclusionary rule applies.

United States v. Leon requires the Court to do a balancing to determine the application of the exception, a balancing between the societal cost of exclusion, letting criminals go free, and the benefit of deterring constitutional violations.

Now, the violation here is not even a constitutional one, only a violation of some administrative directive. I have the case of *U.S. v. Hornick*. Except for which supervisory customs officer authorized these three cops, the search was valid. There is no Fourth Amendment issue. Therefore, it is not so important that this sort of violation be deterred in so drastic a manner as suppression of the evidence.

Nor is this the sort of issue encountered in *United States v. Curzi* or *United States v. Whiting* where the mistake, albeit in good faith, could be attributable to the agents. Here the officers were told by their base that they were authorized, just as the officer in *Leon* was told by the magistrate that he was authorized. The officers in the field, or on the water, did not make the mistake. Because I find that the officers acted in the good faith belief that their [p. 816] authorization was valid, I will not suppress the evidence for this administrative violation.

Finally, the Court must determine whether the search was a valid border search, which means that the customs officers, here the police, had to have cause to believe that

the vessel recently crossed the border without its contents being materially changed since crossing. *U.S. v. Almeida-Sanchez*.

If so, the officers could conduct a complete search without any suspicion of wrongdoing whatsoever. It is clear from the evidence that the vessel departed from Santo Domingo for Puerto Rico, and that the officers, from the radio, knew that. Thus, the only issue is whether the border, the three-mile limit, had been crossed.

I find that, by a preponderance of the evidence, the vessel was within the three-mile territorial seas. The testimony of the officers was credible and consistent with that of Lora's time estimate. The only real conflict was the testimony of Sosa, and I find that he did not know and was not credible in his statement that the vessel was farther out.

Because the vessel was within the three-mile limit, having recently come in from outside that limit, and because the officers acted in the good faith belief that their authorization was valid, the motion to suppress is again denied.

Now, the ruling on the bill of particulars.

[p. 817] While I am very upset that the Government did not comply with the order of this Court to file a bill of particulars, and therefore I would be inclined to bind the Government to its statement that the vessel was within three miles, even on Count One, I have nonetheless considered the merits of this situation.

The Government may offer proof contradictory to a bill of particulars and submit it to the jury when the

defendant has pretrial notice of the evidence, when there is a lack of prejudice, and when the variance is immaterial. See *United States v. Rivero*.

The defendants here had prior notice, since all of the evidence about the location of the vessel was presented at a suppression hearing. Thus, there is no prejudice.

Moreover, the statute provides several bases for jurisdiction over vessels: United States flag vessels, stateless vessels, vessels making contradictory claims of nationality, and vessels in United States customs waters, which, by the way, are 12 miles.

The Court ordered a bill of particulars stating the statutory basis for jurisdiction. If the Government had said that the vessel was within 12 miles, but at trial only proved that the vessel was, for example, stateless, the jury could not convict. That would be a fatal variance. But here we have the same statutory basis: The customs waters. [p. 818] Statutorily it makes no difference whether the vessel is within territorial or customs waters. So, in effect, the further restriction to the three-mile limit is surplusage, in the same manner as when an indictment charges that an offense was committed in the Miramar section of San Juan, but the proof is that it was committed nearby in Santurce. If there is no prejudice, there is no foul.

Therefore, I rule that the jury can convict the defendants on Count One if they find that the vessel was within 12 miles. Of course, for Count Two they must find that it was within three miles, and the attorneys can, of

course, argue about the witnesses' credibility with regard to their statements as to the location of the vessel.

That's the ruling of the Court.

* * *

APPENDIX D

MEMORANDUM OF UNDERSTANDING BETWEEN THE PUERTO RICO POLICE DEPARTMENT AND THE U.S. CUSTOMS SERVICE REGARDING THE DESIGNATION OF EMPLOYEES OF THE PUERTO RICO POLICE DEPARTMENT AS CUSTOMS OFFICERS.

I. Purpose

The Puerto Rico Police Department and the U.S. Customs Service (CUSTOMS SERVICE) agree that effective enforcement of the laws relating to narcotics, marijuana and dangerous drugs requires close cooperation and coordination between the two agencies and have therefore entered into this agreement to govern the use of Customs officer designations by certain employees of The Puerto Rico Police Department.

II. Agreement

There may be instances when it may be desirable on occasion for certain employees of The Puerto Rico Police Department to be able to perform certain Customs duties. Pursuant to section 401(i), Tariff Act of 1930, as amended (19 U.S.C. § 1401(i)), Treasury Department Order 165, Revised (T.D. 53654), and Customs Delegation Order 48 (T.D. 73-302), the Regional Commissioner of Customs is authorized to designate persons as Customs officers to perform any of the duties of a Customs officer.

The two agencies, have therefore, entered into an agreement as follows:

A. The Customs Service agrees:

1. to designate certain employees of The Puerto Rico Police Department as Customs officers (excepted) without additional compensation to perform the duties shown on the attached Customs Form 55 (which is hereby made a part of this Agreement).

2. to provide to the designated employee appropriate training in Customs laws, policies and procedures.

3. to issue a designation form as described in A1 above to each qualified employee of The Puerto Rico Police Department

B. The Puerto Rico Police Department agrees:

1. to advise the Customs Service of each situation in which The Puerto Rico Police Department proposes to use a Customs officer designation.

2. that Customs officer designations to employees of The Puerto Rico Police Department will be used only in situations when there has been specific advance approval by the Customs Watch Commander and only to the extent approved by the Customs Watch Commander and for the duration of the specific law enforcement activity for which the approval was gained.

3. to thereafter report in writing to Customs the results.

4. to advise the Customs Service of each court proceeding in which the validity of Customs search, seizure or arrest authority has become an issue; and to permit Customs to provide legal memoranda or other assistance in such cases when desired by Customs.

5. to follow customs Service directives and instructions applicable to Customs officers concerning Customs search, seizure and arrest authority.

C. Both agencies

1. recognize that any abuse of Customs officer designations may lead to the revocation of such designations by Customs Service.

2. agree to exchange implementing instructions prior to issuance.

3. agree to meet from time to time to review this agreement.

/s/ Carlos Lopez Feliciano
PUERTO RICO POLICE DEPARTMENT
/s/ Superintendent

Regional Commissioner
U.S. CUSTOMS SERVICE

EXHIBIT E

SEAL

THE DEPARTMENT OF THE TREASURY –
UNITED STATES CUSTOMS SERVICE
DESIGNATION, CUSTOMS OFFICER (EXCEPTED)

NAME OF OFFICER BEING DESIGNATED
Leopoldo Seda Ruiz

SOCIAL SECURITY NUMBER
581-62-3271

RANK OR GRADE
Policeman

CUSTOMS DESIGNATION
CUSTOMS OFFICER (EXCEPTED)

POSITION AND AGENCY OR SERVICE
Puerto Rico Police Department

DUTY STATION(S)
Marine Unit, Mayaguez, PR

EFFECTIVE DATE
MAR 15 1988

Pursuant to the provisions of 19 U.S.C. 1401(i), and appropriate redelegations, and by agreement with your employing agency or service, you are hereby designated a Customs Officer (Excepted) without additional compensation. This designation, for the performance of such duties as outlined below, will be in effect while you remain in your present position and location unless revoked at an earlier date.

In performing the duties of a Customs officer, you will be subject to all guidelines, directives and instructions of the United States Customs Service.

Arrangements will be made for you to receive the training necessary to perform your duties as a Customs officer at your location.

DUTIES: When authorized by the U.S. Customs Service Special Agent-in-Charge or Watch Commander:

1. Maintaining surveillance, boarding and searching of vessels and aircraft suspected of having contraband drugs on board.
2. Conducting Customs searches and seizing articles smuggled or otherwise illegally introduced into the United States.
3. Conducting Customs searches and seizing articles being exported from the U.S. in violation of law.
4. Arresting smugglers found bringing merchandise or other articles into the U.S. from foreign countries illegally. Arresting persons attempting to export merchandise in violation of law.

This designation does not modify current Customs procedures or practices concerning the reporting, handling, and Investigation of persons arrested and seizures made for violations of laws enforced by the Custom Service. Any arrests and seizures effected while acting under this designation and any information received concerning Customs or related violations should be promptly reported to the nearest Customs office.

Endorsements and restrictions, if any:

Signature of designating officer

Printed name and title of designating officer

/s/ George Heavey
GEORGE HEAVEY, REGIONAL COMMISSIONER

Issuing Region, District or Headquarters office

Southeast Region, U.S.C.S.

CUSTOMS FORM 55 (1/11/74) Previous editions are obsolete and should not be used.

SEAL

THE DEPARTMENT OF THE TREASURY -
UNITED STATES CUSTOMS SERVICE
DESIGNATION, CUSTOMS OFFICER (EXCEPTED)

NAME OF OFFICER BEING DESIGNATED
Hector Agosto

SOCIAL SECURITY NUMBER
582 21 6240

RANK OR GRADE
Auxiliary Agent

CUSTOMS DESIGNATION
CUSTOMS OFFICER (EXCEPTED)

POSITION AND AGENCY OR SERVICE
Puerto Rico Police Department

DUTY STATION(S)
San German Narcotic Unit

EFFECTIVE DATE
MAY 03 1988

Pursuant to the provisions of 19 U.S.C. 1401(i), and appropriate redelegations, and by agreement with your employing agency or service, you are hereby designated a

Customs Officer (Excepted) without additional compensation. This designation, for the performance of such duties as outlined below, will be in effect while you remain in your present position and location unless revoked at an earlier date.

In performing the duties of a Customs officer, you will be subject to all guidelines, directives and instructions of the United States Customs Service.

Arrangements will be made for you to receive the training necessary to perform your duties as a Customs officer at your location.

DUTIES: When authorized by the U.S. Customs Service Special Agent-in-Charge or Watch Commander:

1. Maintaining surveillance, boarding and searching of vessels and aircraft suspected of having contraband drugs on board.
2. Conducting Customs searches and seizing articles smuggled or otherwise illegally introduced into the United States.
3. Conducting Customs searches and seizing articles being exported from the U.S. in violation of law.
4. Arresting smugglers found bringing merchandise or other articles into the U.S. from foreign countries illegally. Arresting persons attempting to export merchandise in violation of law.

This designation does not modify current Customs procedures or practices concerning the reporting, handling, and investigation of persons arrested and seizures made for violations of laws enforced by the Custom Service.

Any arrests and seizures effected while acting under this designation and any information received concerning Customs or related violations should be promptly reported to the nearest Customs office.

Endorsements and restrictions, if any:

Signature of designating officer

/s/ George Heavey

Printed name and title of designating officer

GEORGE HEAVEY, REGIONAL COMMISSIONER

Issuing Region, District or Headquarters office

Southeast Region, U.S.C.S.

CUSTOMS FORM 55 (1/11/74) Previous editions are obsolete and should not be used.

SEAL

THE DEPARTMENT OF THE TREASURY –
UNITED STATES CUSTOMS SERVICE
DESIGNATION, CUSTOMS OFFICER (EXCEPTED)

NAME OF OFFICER BEING DESIGNATED
Alberto Irizarry Carlo

SOCIAL SECURITY NUMBER
092-32-7226

RANK OR GRADE
Policeman

CUSTOMS DESIGNATION
CUSTOMS OFFICER (EXCEPTED)

POSITION AND AGENCY OR SERVICE
Puerto Rico Police Department

DUTY STATION(S)
Marine Unit, Mayaguez, PR

EFFECTIVE DATE
MAR 15 1988

Pursuant to the provisions of 19 U.S.C. 1401(i), and appropriate redelegations, and by agreement with your employing agency or service, you are hereby designated a Customs Officer (Excepted) without additional compensation. This designation, for the performance of such duties as outlined below, will be in effect while you remain in your present position and location unless revoked at an earlier date.

In performing the duties of a Customs officer, you will be subject to all guidelines, directives and instructions of the United States Customs Service.

Arrangements will be made for you to receive the training necessary to perform your duties as a Customs officer at your location.

DUTIES: When authorized by the U.S. Customs Service Special Agent-in-Charge or Watch Commander:

1. Maintaining surveillance, boarding and searching of vessels and aircraft suspected of having contraband drugs on board.

2. Conducting Customs searches and seizing articles smuggled or otherwise illegally introduced into the United States.

3. Conducting Customs searches and seizing articles being exported from the U.S. in violation of law.

4. Arresting smugglers found bringing merchandise or other articles into the U.S. from foreign countries illegally. Arresting persons attempting to export merchandise in violation of law.

This designation does not modify current Customs procedures or practices concerning the reporting, handling, and investigation of persons arrested and seizures made for violations of laws enforced by the Custom Service. Any arrests and seizures effected while acting under this designation and any information received concerning Customs or related violations should be promptly reported to the nearest Customs office.

Endorsements and restrictions, if any:

Signature of designating officer

Printed name and title of designating officer

/s/ George Heavey
GEORGE HEAVEY, REGIONAL COMMISSIONER

Issuing Region, District or Headquarters office

Southeast Region, U.S.C.S.

CUSTOMS FORM 55 (1/11/74) Previous editions are obsolete and should not be used.

Supreme Court, U.S.
FILED
APR 25 1991
OFFICE OF THE CLERK

No. 90-1385

In the Supreme Court of the United States

OCTOBER TERM, 1990

FERNANDO W. ANGLADA-ALVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS M. GANNON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a border search of a vessel by Puerto Rico police officers who were designated to serve as United States customs officers violated petitioner's Fourth Amendment rights.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 920 F.2d 77. The pertinent decisions of the district court (Pet. App. 27-38) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1990. The petition for a writ of certiorari was filed on February 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Puerto Rico, petitioner was convicted of possessing approximately 63 kilograms

of cocaine with the intent to distribute it, in violation of 46 U.S.C. 1903(a), (c), and (f) (Count 1), and importing that cocaine into the customs territory of the United States, in violation of 21 U.S.C. 952(a) (Count 2). The district court sentenced him to concurrent terms of 211 months' imprisonment on each count, to be followed by a five-year period of supervised release. Gov't C.A. Br. 2.[1] The court of appeals affirmed. Pet. App. 1-26.

1. On November 16, 1988, a team of Puerto Rico police officers headed by Alberto Irizarry Carlo ("Irizarry") were on patrol off the southwestern coast of Puerto Rico aboard the motor launch ZP-7. The team, known as "FURA," the Spanish acronym for "United Forces for Rapid Action," also included Officer Agosto of the Puerto Rico Police Narcotics Division, and Officers Seda, Rondo, Toro, and Torres of the Puerto Rico Police Marine Division. Irizarry, Agosto, and Seda had been designated by the Regional Commissioner of Customs to serve as United States customs officers. As such, they were empowered, when authorized by "the U.S. Customs Service Special Agent-in-Charge or Watch Commander," to board and search vessels suspected of having contraband on board and to conduct customs searches. Pet. App. 3, 39-48; Gov't C.A. Br. 5-6.[2]

---

[1] Petitioner's co-defendant, Pedro R. Victoria Peguero, was convicted of the same offenses, and he was sentenced to concurrent terms of 200 months' imprisonment on each count, to be followed by a five-year term of supervised release. Gov't C.A. Br. 2.

[2] In pertinent part, the officers' designation forms identified their duties as cross-designated customs officers as follows (Pet. App. 43, 45, 47):

At about 7:30 p.m., Irizarry received a radio message from the M/V CATU, stating that the vessel was leaving the Dominican Republic en route to Puerto Rico and inquiring about weather conditions on the west coast of Puerto Rico. Irizarry furnished the requested information and identified the ZP-7 as a marine police vessel. He did not, however, provide a specific answer to the CATU's request for the ZP-7's location. Gov't C.A. Br. 7; Pet. App. 3.

Around 9:15 p.m., as the ZP-7 was approaching a buoy off Puerto Real, about one and one-half miles from shore, Irizarry and Agosto saw the CATU and contacted it by radio. The crew of the vessel inquired whether they were heading in the right direction for Puerto Real. The police responded affirmatively, identified themselves, and expressed their intention to come alongside the CATU and check its documenta-

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When authorized by the U.S. Customs Service Special Agent-in-Charge or Watch Commander:

1. Maintaining surveillance, boarding and searching of vessels and aircraft suspected of having contraband drugs on board.
2. Conducting Customs searches and seizing articles smuggled or otherwise illegally introduced into the United States.

In the Memorandum of Understanding between the Puerto Rico Police Department and the Customs Service governing the employment of cross-designated officers, the department agreed, among other things (Pet. App. 40):

> that Customs office designations to employees of The Puerto Rico Police Department will be used only in situations where there has been specific advance approval by the Customs Watch Commander and only to the extent approved by the Customs Watch Commander and for the duration of the specific law enforcement activity for which the approval was gained.

tion. Using a variable range finder, Irizarry determined that the two vessels were then roughly 1.5 miles from shore. Gov't C.A. Br. 7-8; Pet. App. 3-4.

The impossibility of the CATU's travelling from the Dominican Republic to Puerto Rico in the two hours between its radio calls to the ZP-7 aroused Officer Agosto's suspicions. Consequently, after the document check, Agosto called the Puerto Rico Police Department's Narcotics Division to request authorization from the United States Customs Service for a search of the CATU. The request was relayed to the Customs Service office in San Juan, Puerto Rico, which referred the matter to William Jimenez, the supervisor for the Customs Service's air smuggling group and the Service's coordinator for matters related to FURA activities. Jimenez gave permission to board and search the CATU. Gov't C.A. Br. 8-9; Pet. App. 4.

Officers Agosto and Seda boarded and searched the CATU, which was manned by petitioner and three others. Agosto found approximately 65 kilograms of cocaine behind a load of air-conditioner parts in a hard-to-reach below-deck compartment. He informed petitioner and his three companions that they were under arrest. Petitioner was taken to the Customs Service office at Mayaguez, Puerto Rico, where he made a series of highly incriminating statements. Gov't C.A. Br. 10-12; Pet. App. 4-5.

2. In the district court, the defendants moved to suppress the evidence obtained as a result of the seizure and search of the CATU. After a hearing, a United States magistrate recommended that the motions be denied. The district court adopted the magistrate's recommendation, rejecting the defendants' contention that the officers had not received the advance approval for the search required by their des-

ignations. Pet. App. 27-33. The court noted that the record supported the magistrate's conclusion that the officers had obtained the requisite advance approval for the search, but held that 19 U.S.C. 1581(a) made approval unnecessary in any event. Pet. App. 30.

The district court also denied the suppression motion when the defendants renewed it during the trial. The court found it unnecessary to decide whether the search of the CATU had been approved by a Customs Service "watch commander." It held that because the FURA officers who conducted the search acted in the good faith belief that they had been duly authorized to do so, the good faith exception to the exclusionary rule required denial of the motion. Pet. App. 34-36.

3. The court of appeals affirmed. Pet. App. 1-26. The court noted that border searches, including reasonable searches at the functional equivalent of the nation's sea border, are exceptions to the general rule that warrantless searches are unconstitutional, and that such border searches are reasonable "by the single fact that the person or item in question ha[s] entered into our country from outside." *Id.* at 5-6. Although there was some question as to the geographic limits of a valid border search at sea, the court continued, the approach most favorable to the defendants would uphold such a search as long as it occurred within the territorial waters of the United States (those waters within three miles of shore). *Id.* at 7. The court concluded that the district court's finding that the search at issue occurred 1.5 miles from shore, at the functional equivalent of the sea border, was not clearly erroneous. *Id.* at 8.

The court next rejected the contention that 19 U.S.C. 1401(i),[3] which specifies the "customs officers" who are empowered to conduct border searches of vessels, did not permit the FURA officers at issue to serve in that capacity. Pet. App. 8-11. The court noted that Section 1401(i) encompasses not only members of the Customs Service and the Coast Guard, but also any "*other person authorized by law or designated by the Secretary of the Treasury* to perform any duties of an officer of the Customs Service." Pet. App. 8. The court concluded that the FURA officers were eligible, if properly designated, to conduct border searches under the statute. *Id.* at 11. Further, finding that authority to designate customs officers had been delegated to the Regional Commissioner of Customs who appointed the FURA officers at issue here, the court determined that the FURA officers had been duly designated to act in that capacity (*id.* at 12-13).

Finally, the court held that the FURA officers received the advance permission to board and search the CATU that was prescribed by their designations. Although the court acknowledged that the record did not reflect that the Customs Service had denominated any "watch commander" as such on the night of the search, the court interpreted that term, as petitioner's counsel suggested, to refer to "the officer in charge at the time." Pet. App. 14. The court concluded that

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[3] That statute defines "customs officer" in connection with searches conducted pursuant to 19 U.S.C. 1581(a) as:

> [A]ny officer of the United States Customs Service of the Treasury Department * * * or any commissioned, warrant, or petty officer of the Coast Guard, or any agent or other person authorized by law or designated by the Secretary of the Treasury to perform any duties of an officer of the Customs Service.

the FURA officers obtained advance permission for the search from such a "watch commander." *Id.* at 15. The court explained that Agent Jimenez, the Customs Service agent who authorized the search, testified that he was the "'functional equivalent' of the watch commander"; that his actions were "entirely consistent with the idea that [he] was the person in charge at the critical moment"; and that "the absence of evidence that any higher ranking customs official was then on duty" bolstered the conclusion that he was the functional equivalent of the watch commander. *Id.* at 14-15.[4]

ARGUMENT

1. Petitioner contends (Pet. 6-10) that the search of the CATU was illegal because the FURA officers failed to obtain advance approval for the search from a "watch commander."

Under 19 U.S.C. 1401(i) and (j) and 19 U.S.C. 1581(a), "any agent or other person authorized by law or designated by the Secretary of the Treasury to perform any duties of an officer of the Customs Service" may conduct searches of vessels within the "customs waters" of the United States (waters within 12 nautical miles of the shore). See *United States* v. *Thompson*, 475 F.2d 1359, 1362 (5th Cir. 1973) (by series of proper delegations, any person designated by Secretary of Treasury may serve as customs agent).

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[4] The court of appeals also rejected the defendants' challenges to the empanelment of the jury (see Pet. App. 16-21), the jury charge (see *id.* at 21-22), the sufficiency of the evidence (see *id.* at 22-24), the denial of a motion for a continuance (see *id.* at 24-25), and the voluntariness of petitioner's post-arrest statements (*id.* at 25-26). Petitioner does not seek further review of those questions.

Under Treasury Department Order No. 165, Revised, 19 Fed. Reg. 7241 (1954), the United States Commissioner of Customs was empowered to act on behalf of the Secretary of the Treasury. Through Customs Delegation Order No. 48 (T.D. 73-302, Oct. 26, 1973), the Commissioner of Customs delegated to the Regional Commissioners of Customs the authority to designate persons as customs officers. Here, the Regional Commissioner of Customs at Miami, George Heavey, duly designated Officers Irizarry, Agosto, and Seda to serve as customs officers. Gov't C.A. Br. 17. Those designations empowered the officers, "[w]hen authorized by the U.S. Customs Service Special Agent-in-Charge or Watch Commander," to board and search vessels suspected of having contraband on board, to conduct Customs searches, and to seize articles illegally smuggled into the United States. Pet. App. 43-48.

The FURA team intercepted the CATU approximately 1.5 miles from shore, after the CATU had crossed the sea border and entered United States territorial waters. Before searching the vessel, Officer Agosto received specific advance approval for the boarding from Agent Jimenez, who was the functional equivalent of a Customs Service "watch commander" in Puerto Rico on the evening of November 16, 1988. On these facts, the court of appeals correctly determined that the search of the CATU was a lawful search conducted by duly authorized "customs officers" (19 U.S.C. 1401(i), 1581) at the functional equivalent of the nation's sea border. Pet. App. 14-15.

Searches of persons and vehicles crossing the borders of the United States "are reasonable simply by virtue of the fact that they occur at the border."

United States v. *Ramsey*, 431 U.S. 606, 616 (1977); see also *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537-540 (1985). Such searches

> are universally thought to be legitimate; [they] protect an important national interest—the prevention of smuggling; smuggling activities would be almost impossible to detect without [these] searches; people crossing into a nation's territorial waters know they are likely to be searched; and vessels are searched only because they belong to a morally neutral class.

United States v. *Williams*, 617 F.2d 1063, 1085 (5th Cir. 1980). Accordingly, when a vessel crosses into the customs waters of the United States, customs officers may board it without permission to conduct a safety and document search and may gain access to all common areas of the vessel, including the open deck, cargo holds, engine rooms, and ice holds. *United States* v. *Lopez*, 761 F.2d 632, 635 (11th Cir. 1985). In addition, customs officers have the authority to stop and search a vessel at the functional equivalent of a border, without suspicion of criminal activity, where it is reasonably probable that the vessel has crossed the border. *United States* v. *Helms*, 703 F.2d 759, 763 (4th Cir. 1983).[5]

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[5] There is no conflict between the court of appeals' decision and either *United States* v. *Sandoval Vargas*, 854 F.2d 1132, 1136 (9th Cir. 1988), or *United States* v. *Soto-Soto*, 598 F.2d 545, 550 (9th Cir. 1979). Both of those cases stand for the proposition that a search conducted without participation by or coordination with customs officers is not a border search within the meaning of the customs laws. In the present case, the border search was approved by Customs Service agent Jimenez and was conducted by properly cross-designated customs officers Agosto and Seda.

In the final analysis, petitioner challenges only the determination that the Customs Service agent who authorized the search, Agent Jimenez, was a "watch commander" within the meaning of the documents designating three members of the FURA team to serve as customs officers. The interpretation of those materials and their application to the particular facts of this case present no question calling for this Court's review. Moreover, the record requires rejection of petitioner's contention. Agent Jimenez testified that he was the " 'functional equivalent' of the watch commander," his actions were entirely consistent with that characterization, and the record did not reflect that any higher ranking Customs Service official was then on duty.

2. The petition presents two additional questions not decided by the court of appeals. Petitioner contends: (1) that *United States* v. *Caceres*, 440 U.S. 741 (1979), would not render the exclusionary rule inapplicable to any deviation from the procedure required by the cross-designation documents (Pet. 10-14); and (2) that the "good faith" exception to the exclusionary rule (see *United States* v. *Leon*, 468 U.S. 897 (1984)) is inapplicable (see Pet. 14-16). The court of appeals found it unnecessary to reach those questions (Pet. App. 15 n.4; see Pet. 11, 14), and this Court does not ordinarily consider questions not specifically passed upon by the court below. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957).

In any event, petitioner's contentions are without merit. The district court correctly applied *United States* v. *Caceres*, 440 U.S. at 755-757, when it ruled that an administrative violation, if one in fact oc-

curred, does not trigger application of the exclusionary rule. Similarly, because the officers boarded and searched the CATU in the good faith belief that they had been validly authorized to do so by Agent Jimenez, the district court was also correct in ruling that the "good faith" exception to the exclusionary rule, *United States* v. *Leon*, 468 U.S. at 909, barred suppression of the evidence. See also *Illinois* v. *Krull*, 480 U.S. 340 (1987); *United States* v. *Williams*, 622 F.2d 830, 840-843 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1991

(1) U.S. GOVERNMENT PRINTING OFFICE: 1991 [illegible]